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Authors and acknowledgements

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The Family Law Association of Scotland: www.familylawassociation.org

The Scottish Child Law Centre: www.sclc.org.uk

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Legally binding agreements: property division and child care when relationships break down

Background

In Scotland, couples are able to enter into a written agreement regulating the division of their property and any ongoing support for each other, or for their children, when they separate. These ‘minutes of agreement’ mean individuals do not have to go to court. They may register their signed agreement in the Books of Council and Session where it becomes a legally binding agreement with the same force as a court order.

Spouses wishing to divorce still have to obtain a divorce decree from the court, but the court is under no obligation to review the content of the minutes of agreement about property at that point.

Usually people only become aware they can reach agreement over their property in this way after consulting solicitors who advise their client what their rights are, based on the provisions of the Family Law (Scotland) Act 1985.

The Family Law (Scotland) Act 1985

At the time the 1985 Act was passed, the Scottish Law Commission considered in detail the purpose of financial provision upon divorce.

The Commission set out 5 principles to guide decisions about financial provision following divorce, and they apply to civil partners as well as spouses.

The first principle is that the matrimonial property should be shared fairly, with ‘fairly’ being defined as ‘equally’ except where special circumstances exist.

Importantly this includes the value of any pension accumulated during the subsistence of the marriage and excludes assets acquired by one party from gifts or inheritance. Property owned by either party before the marriage remains their own property.

The second principle of the 1985 Act is that “fair account” is to be taken of any economic disadvantage one party may have suffered in the interests of the other during the marriage or any economic advantage one party gained from the contributions of the other.

The final three principles deal with financial provision for future events and these are:

- that any economic burden of caring for children after separation should be shared fairly between the parties
- that a person who has been dependent to a substantial degree on the financial support of the other should be awarded financial provision to enable them to adjust (but for not more than three years)
- that a person who seems likely to suffer serious financial hardship as a result of the divorce should be awarded reasonable financial provision to relieve him or her of hardship over a reasonable period.

Key points

- The clear principles governing financial provision in the Family Law (Scotland) Act 1985 facilitate parties who separate to enter their own agreements without going to court.
- The use of minutes of agreement has almost doubled in the last 20 years.
- Most agreements are between couples who are home owners.
- Women usually want to retain the family home and may forego their fair share of their husband's pension in order to secure this.
- Parties with private pensions are reluctant to disclose the value of their pension/s or to include these in the division of property. Only 11% of agreements expressly take the value of a pension into account.
- Most parental couples agree children will live with their mothers (90%) and contact will be “as arranged between the parties”.
- The proportion of minutes of agreement registered by unmarried couples doubled in 20 years to 15% in 2010 but only 1% were registered by same-sex couples.
- The terms of the agreements were adhered to in the great majority of agreements.

In practice courts favour a “clean financial break” and on-going financial support for one or other party post-divorce is rare, especially beyond a three year period.

The study

This briefing presents findings from an analysis of 600 randomly selected minutes of agreement that were entered into by couples in 2010, and from interviews with 30 people who entered into agreements, and with 13 solicitors. Interviewees were invited to take part from as diverse a range of circumstances as possible, having been identified from their minute of agreement.

The study aimed to determine the extent to which couples use minutes of agreement to regulate property division, what they actually agree, and the extent to which what they agree reflects the provisions of the 1985 Act and the wider policy objectives of the family justice system in Scotland. Ethical considerations are detailed in the full report.

How does this research contribute to what we already know?

The only previous research into out-of-court written agreements was conducted in 1992 (Wasoff, McGuckin and Edwards 1997). Since then there have been significant changes in family law in Scotland. These include the Children (Scotland) Act 1995 (which expressly states both parents retain parental rights and responsibilities in respect of their children post separation); the Civil Partnership Act 2004 and the Family Law (Scotland) Act 2006 (which gives unmarried couples who separate limited rights to claim financial provision).

The present study considers the impact of these legal changes on the use of minutes of agreement in family law, through comparison with the findings of the earlier study.

Key changes include: in 1992, 95% of parents stated who the children were to live with; this dropped to 73% in 2010, and in 13% of agreements parents agreed they would consult with their children over contact arrangements.

Other key shifts include: increased mention of pensions (from 9% to 57%) and increased sharing of pensions (from 3% to 11%), but a halving of ongoing spousal support (from 10% to 5%).

Since the 1992 study there has also been a growth in the numbers of solicitors using less adversarial techniques to broker agreement. 1 in 5 had used some form of “alternative dispute resolution” at some point during negotiations, usually “collaborative law” which involves joint meetings with both parties and their legal representatives.

Findings

Almost 5,000 minutes of agreement dealing with the division of property upon separation were entered into by couples in 2010. This indicates that the use of minutes of agreement in this context has doubled since the 1992 study.

One solicitor suggested this increase may be due to the clear definition of matrimonial property and the principles within the 1985 Act:

The minute of agreement was always around but I think it may have become a more popular way of taking things forward because for many couples the Family Law Scotland Act 1985 is a process of definition and adding up and dividing and going from there.

Solicitor

However, it could also be in part due to the growth of conciliatory practice amongst solicitors (many of whom do not do court work). A number of solicitors interviewed (but by no means all) described their sense of responsibility for reducing potential conflict:

I think you've got to be really careful with people, as solicitors [...] a throw away sentence can cause so much difficulty.

Solicitor

Who enters into agreements?

Almost all the agreements were entered into following separation (97%). However nine were entered into during a relationship, five were ante-nuptial agreements and a further five were pre-cohabitation agreements. All of these dealt with the division of property should the parties separate.

Despite the introduction of civil partnerships between same sex couples in 2004, only 1% (5) of minutes of agreement were between same sex couples and three of these couples were cohabiting and not civil partners. However, the proportion of agreements entered into by heterosexual cohabitants had doubled since the 1992 study (from 7% to 15% of all registered agreements) reflecting the growth in heterosexual cohabitation as well as the introduction of the right of cohabitants to claim some financial provision on separation from 2006.

Taking legal advice

On divorce, courts may set aside or vary any agreement which was not “fair and reasonable” at the time it was made. Potentially a minute of agreement might be open to challenge if the parties did not have the benefit of separate legal advice.

However, only 73% of minutes of agreement expressly stated both parties had used legal advice, while 5% said one party had declined to take advice (most usually the male party).

In interviews, some respondents stated that cost was a key reason they had not taken legal advice, while for some, all they wanted was for a legally qualified individual to put what they had already agreed between themselves into writing and they did not see why it was necessary for them each to speak with their own solicitor.

Parties, whose ex-spouse or partner had not taken legal advice said they would have liked it if they had, as then that other person would know that what they had asked for in settlement was fair.

Three interviewees had attempted mediation, one of whom had reached agreement by this means. 10% of interviewees described meeting around a table with their solicitor, and their estranged spouse/partner and his or her solicitor to reach agreement on at least one occasion.

What do they agree?

Arrangements concerning children

Children were mentioned in 46% of agreements and in three quarters of these the residence of the child was agreed. Most (90%) were to live with their mother, while 4% were to live with their father. In 5% of agreements the phrase “shared care” was used but child support usually continued to be paid to the mother. Child support and contact arrangements were discussed in two-thirds of agreements involving children. Contact was usually to be “as agreed between the parties” (80%) and in five minutes of agreement the parties agreed to use family mediation if they fell into dispute over contact. The amount of child support payable was most typically calculated using the formula on the Child Support Agency website.

Division of property

Minutes of agreement rarely detail the *value* of the assets to be divided, and so as a general rule it is not possible to determine from those minutes alone what the proportionate division of assets is in value terms. However, interviews revealed that those entering into minutes of agreement had usually broadly conformed to the principle of an equal division of assets (although the other party's infidelity could impact on whether the interviewee believed this to be just).

The influence of the clean break principle was evident in the advice solicitors said they give to their clients and, not surprisingly, in the agreements the parties entered into. Only 5% of agreements included payments of ongoing financial support. In nearly three quarters of these, this was payable for three years or less – reflecting the statutory provisions of the 1985 Act.

Most (94%) of those entering into minutes of agreement in 2010 were home owners (compared to a national average of 64%). The most common agreement regarding the family home was that it be transferred to the female party 38%; sale of the property was the second most common agreement at 33%. Transfer to the male party happened in 25% of agreements. Half of all minutes of agreement included a transfer of a capital sum and in half of these agreements the amount was equivalent to half the net value of the family home.

A parent was more likely to get the family home when she or he had primary care of dependent children (48% of primary carers obtaining sole title in the home). However, most primary carers and their children did not remain in the family home; the existence of significant debts or women re-partnering (and going to live in that new partner's home) were factors that increased the likelihood of the sale of the home.

A recurrent theme throughout the interviews was women's determination that they (and their children) should be able to stay within the family home:

I liked where I stayed. It's close to my work and I wanted to give my son at least one stable home. It's his home that, you know, he was brought home to when he was born.

Women spoke of increasing their hours of work, or of returning to work and claiming working tax credits, in order to keep the family home. Family members acting as guarantor or evidence of income in the form of child support could also help them to secure a mortgage in their sole name.

Male interviewees did not express the same sentiment in respect of retaining the family home. Rather, for men, their pensions were fairly consistently the key asset they wished to retain:

... as long as she didn't get my pension then, you know, I was quite happy for her to have what she wanted.

Despite the fact that the value of the pension accumulated during the marriage is matrimonial property, only 57% of minutes of agreement mentioned pensions and, of these, 80% merely discharged any claim either party might have on any pension the other party might have. This left a significant number of women vulnerable to poverty in later life.

Life after agreement

The terms of the agreements had been adhered to in the great majority of cases. Both male and female interviewees generally believed their life was better post agreement. Men reported their

financial situation was either the same or better than when they were married but 25% of women reported income falling below £15,000. Nonetheless a theme among women was that even though they did not have the money for a better standard of life they considered they had a better quality of life (especially when their former spouse had been a drinker or abusive or controlling). Both men and women appreciated having control of their own finances but some men lamented having to do household chores now they were on their own.

Most (75%) interviewees reported they were either mildly or very satisfied with the agreement they had entered into. When parties had experienced extreme stress around the time of negotiations or the other party had defeated the terms of the agreement this reduced satisfaction levels. Examples of this included the other party claiming his business was doing badly resulting in reduced child support payments, or the other party moving to another jurisdiction and failing to maintain spousal payments. Nonetheless, interviewees were glad of their written agreements:

If you've got it in black and white you can't go again and say, no that's not what was agreed. You know, and it's just protection for you



Policy and practice implications

- **Access to accurate legal advice is important:** There is evidence that parties who did not take legal advice were unaware of their entitlements and may have suffered economic disadvantage as a result.
- **Affordable legal advice is important:** Concern over escalating costs meant parties sometimes did not take advice or did not pursue the division of an asset. This included those in receipt of legal aid who have to repay the cost of the advice to the Scottish Legal Aid Board.
- **Women continue to be at increased risk of poverty after divorce and on retirement:** Only female interviewees reported being poor in the wake of their divorce as a result of the divorce. Because women are generally less well paid than men and because they are more likely to take breaks in employment to care for children, they are significantly disadvantaged when they do not obtain a fair share of their spouse's pension on divorce.
- **Post separation parenting:** Maternal residence is the arrangement made by the great majority of parents reaching agreement. This is in contrast to the present push in other jurisdictions for a presumption of shared residence.
- **The cost of care:** There appears little recognition of the impact that care of children is likely to have on women's ability to engage in paid employment or ensure their financial security in later life.